

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DEBRA K. WELTY</b>	)	
Claimant	)	
VS.	)	
	)	
<b>USD 259</b>	)	Docket No. 1,016,438
Self-Insured Respondent	)	

**ORDER**

Respondent appealed the January 28, 2011, Award entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Workers Compensation Board (Board) heard oral argument on April 15, 2011.

**APPEARANCES**

Robert R. Lee of Wichita, Kansas, appeared for claimant. Dallas L. Rakestraw/Vincent A. Burnett of Wichita, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. The Board also considered the two court-ordered independent medical examination reports of Dr. Joseph Sankoorikal and Dr. Paul Stein.

**ISSUES**

This is a claim for a September 3, 2003, accident. Claimant filed her initial Application For Hearing, Form K-WC E-1, in this case on April 21, 2004, and the regular hearing was held on April 8, 2010, more than five years later. Respondent contends claimant's claim is time-barred pursuant to the plain language of K.S.A. 2006 Supp. 44-523(f) and should be dismissed. In the January 28, 2011, Award, ALJ Barnes determined claimant's claim is not subject to dismissal. The ALJ found K.S.A. 2006 Supp. 44-523(f) should be applied prospectively, and because it operates prospectively, it does not affect accidents that occurred before its effective date of July 1, 2006.

With regard to the nature and extent of claimant's disability, the ALJ found claimant sustained a 16% whole body functional impairment. In addressing claimant's award of

disability benefits, the ALJ noted respondent had paid \$100,000.00 in temporary total disability benefits and the total award of disability benefits was subject to the statutory maximum of \$100,000.00. The ALJ did not determine claimant was permanently totally disabled. The ALJ authorized Dr. David G. Sollo to provide ongoing pain management. Finally, the ALJ found claimant requires ongoing psychological treatment for her injury.

Respondent requests the Board reverse the January 28, 2011, Award and, as a result, dismiss claimant's workers compensation claim for lack of prosecution under K.S.A. 2006 Supp. 44-523. Respondent argues that the plain language of K.S.A. 2006 Supp. 44-523(f) should be followed and because K.S.A. 2006 Supp. 44-523(f) is a statute of limitations, it applies retrospectively. Respondent maintains claimant's claim is time-barred according to the plain language of K.S.A. 2006 Supp. 44-523(f) as the regular hearing occurred more than five years after claimant filed an Application for Hearing. In the alternative, respondent requests the Board determine claimant does not require ongoing psychological treatment. Respondent asserts Dr. Theodore A. Moeller's opinions, that claimant was at maximum medical improvement (MMI) for any psychological conditions related to her work injury, that she sustained no psychological impairment from the work-related injury, and that he did not believe claimant required additional psychological care due to her work injury, are undisputed. With regard to claimant's argument that the Board should not address the issue of ongoing psychological treatment, respondent contends the Board has jurisdiction to review this issue as respondent raised the issue in its submission letter/brief to the ALJ and the Board has statutory authority to review the ALJ's Award in its entirety.

Claimant argues the Board should not dismiss her claim. Claimant asserts the Board has ruled on many occasions that K.S.A. 2006 Supp. 44-523(f) should operate prospectively. With regard to whether psychological treatment should be terminated, aside from claimant's contention that Dr. Moeller's testimony is filled with inconsistencies, claimant argues the Board should not address this issue as she alleges it was raised for the first time on appeal. Claimant maintains that at no time before the entry of the Award did respondent raise the issue that claimant's rights to psychological treatment should be terminated. Claimant contends this issue is not ripe for the Board's consideration and it should be dismissed for lack of jurisdiction. Claimant requests the Board affirm the January 28, 2011, Award.

Respondent did not specifically appeal the Award on the issues of the nature and extent of claimant's disability and that claimant had not reached MMI. Neither claimant nor respondent addressed the issue of nature and extent of disability in their briefs. At regular hearing, claimant's counsel indicated he may request permanent total disability. However, claimant did not address this issue in his submission letter to the ALJ or his brief to this Board. In the Award, the ALJ did not address the issue of whether claimant was at MMI. Therefore, the Board affirms the Award on the issue of nature and extent, and presumes claimant is at MMI.

The issues before the Board on this appeal are:

1. Should this workers compensation claim be dismissed pursuant to K.S.A. 2006 Supp. 44-523(f)?
2. If not, does the Board have jurisdiction of the issues concerning claimant's ongoing medical treatment?
3. If so, is claimant entitled to ongoing psychological treatment?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant injured her left knee on September 3, 2003, when she slipped on water and fell. She eventually saw Dr. Patrick Do, who performed surgery on her left knee on January 19, 2004. Dr. Do released claimant to work on January 21, 2004, and indicated she reached MMI on May 18, 2004. However, claimant continued to have problems with the left knee, and on June 10, 2004, the ALJ appointed Dr. Bradley W. Bruner as authorized treating physician<sup>1</sup>. Due to an altered gait from claimant's left knee problems, she began developing right knee issues. Eventually Dr. Bruner performed arthroscopic surgery on claimant's left knee on October 6, 2004, and on her right knee on June 9, 2008.

Claimant underwent two left lumbar sympathetic blocks for regional pain syndrome in August of 2004 and two more in December of 2004. These were given by Dr. M. Kent Cooper to whom claimant was referred by Dr. Bruner. Dr. Bruner then referred claimant to Dr. David G. Sollo, a pain specialist, who, on January 25, 2005, recommended placing a spinal cord stimulator in claimant on a trial basis to see if it would ease claimant's pain. Dr. Sollo has provided pain management for claimant since January of 2005. In November of 2007, claimant complained to Dr. Sollo of lumbar and thoracic pain. In addition to the spinal cord stimulator, claimant was prescribed narcotic analgesic medications to relieve her pain.

From December of 2004 through the date of the regular hearing (April 8, 2010) claimant received treatment at Prairie View for depression because of her injury and pain. There she sees Dr. Dumont K. Schmidt, a psychologist, for psychotherapy and Dr. Ranjit Ram, a psychiatrist, for depression medication. Since her injury, claimant has seen a number of physicians either for treatment or for an independent medical examination. Pursuant to Orders from the ALJ, claimant underwent independent medical

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<sup>1</sup> Preliminary Hearing Order dated June 10, 2004.

examinations by Dr. Joseph Sankoorikal on September 30, 2008, and by Dr. Paul S. Stein on June 8, 2010.

On July 10, 2008, the ALJ appointed Dr. Sankoorikal to evaluate claimant. Dr. Sankoorikal examined claimant on September 30, 2008. He indicated claimant had a history of CRPS I<sup>2</sup> involving the left knee area; possible trochanteric bursitis to the left thigh; chronic low back pain; status post arthroscopic surgery to the left knee; and a history of spinal stimulator placement. Dr. Sankoorikal indicated claimant has pain in the right knee and that she had seen Dr. Schmidt for a major depressive disorder.

Claimant underwent an independent medical examination by Dr. Stein on June 8, 2010. On June 23, 2010, the ALJ issued an Order indicating the parties agreed that the report of Dr. Stein issued on June 8, 2010, shall be admitted into the evidentiary record without further foundation. In his report, Dr. Stein indicated he reviewed over 1,200 pages of medical records. Dr. Stein indicated claimant had reached MMI with regard to her right knee, left knee and back injuries. He assigned claimant a permanent functional impairment rating for each of those injuries. Those ratings and Dr. Stein's restrictions will not be discussed here as nature and extent was not raised by the parties in this appeal. Dr. Stein did indicate claimant received treatment for depression, and did not know if additional testing by Dr. Moeller would be of benefit. Dr. Stein also deferred to a psychologist as to whether claimant was in need of additional psychological treatment.

Dr. Sollo is continuing to provide pain management, and in January 2010, referred claimant back to Dr. Bruner because of swelling in her right knee and pain in the right knee and hip. Dr. Stein, however, indicated claimant is at MMI and gave her a functional impairment rating of 16% to the body as a whole as a result of her left and right lower extremity and back injury.

Claimant received \$440.00 per week in temporary total disability benefits from October 4, 2004, through February 13, 2009 (227.27 weeks), for a total of \$100,000.00. At regular hearing, respondent's counsel objected to the regular hearing proceeding, alleging claimant has not reached MMI. At the regular hearing, respondent contended claimant was still receiving medical treatment and argued neither Dr. Bruner nor Dr. Sollo indicated claimant had reached MMI. Respondent's counsel also asked the claim be dismissed pursuant to K.S.A. 2006 Supp. 44-523(f) because claimant filed her application for hearing on April 21, 2004, and the regular hearing was held on April 8, 2010.<sup>3</sup>

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<sup>2</sup> Complex regional pain syndrome type I.

<sup>3</sup> R.H. Trans. at 6-8.

**Should this workers compensation claim be dismissed pursuant  
to K.S.A. 2006 Supp. 44-523(f)?**

Respondent alleges this claim should be dismissed pursuant to K.S.A. 2006 Supp. 44-523(f) because the regular hearing was held more than five years after claimant filed her Application for Hearing. K.S.A. 2006 Supp. 44-523(f) states:

Any claim that has not proceeded to final hearing, a settlement hearing, or an agreed award under the workers compensation act within five years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, shall be dismissed by the administrative law judge for lack of prosecution. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the five year limitation provided for herein. This section shall not affect any future benefits which have been left open upon proper application by an award or settlement.

The Board previously decided this issue in *Powe*<sup>4</sup> and *Peters*<sup>5</sup>. In those cases, *Halley*<sup>6</sup> was cited wherein the Kansas Supreme Court stated:

On the question of the retrospective application of a statute, we have said:

“The general rule of statutory construction is that a statute will operate prospectively unless its language clearly indicates that the legislature intended that it operate retrospectively. This rule is normally applied when an amendment to an existing statute or a new statute is enacted which creates a new liability not existing before under the law or which changes the substantive rights of the parties.

“The general rule of statutory construction is modified where the statutory change is merely procedural or remedial in nature and does not prejudicially affect the substantive rights of the parties.

“While generally statutes will not be construed to give them retrospective application unless it appears that such was the legislative intent, nevertheless when a change of law merely affects the remedy or law of procedure, all rights of action will be enforced under the new procedure without regard to whether or not the suit

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<sup>4</sup> *Powe v. Venator Group*, No. 258,968, 2007 WL 2296115 (Kan. WCAB July 31, 2007).

<sup>5</sup> *Peters v. City of Overland Park*, No. 268,461, 2007 WL 2291667 (Kan. WCAB July 31 2007).

<sup>6</sup> *Halley v. Barnabe*, 271 Kan. 652, 24 P.3d 140 (2001).

has been instituted, unless there is a savings clause as to existing litigation.”<sup>7</sup>

In *Lyon*,<sup>8</sup> the Kansas Supreme Court stated:

The liability of an employer to an injured employee arises out of contract between them, and the terms of a statute are embodied in that contract. The injured employee must therefore recover on the contract, and his cause of action accrues on the date of the injury. The substantive rights between the parties are determined by the law in effect on the date of injury. Amendments to the compensation act which are merely procedural or remedial in nature, and which do not prejudicially affect substantive rights of the parties, apply to pending cases. The general rule, however, is that a statute will operate prospectively rather than retrospectively, unless its language clearly indicates that the legislature intended the latter, and that retrospective application will not be given where vested rights will be impaired.

Prior to July 1, 2006, K.S.A. 2006 Supp. 44-523(f) did not exist, and there was no requirement that a regular hearing be held within five years after a worker files his or her application for hearing. K.S.A. 2006 Supp 44-523 does not contain any language that clearly indicates it will be given retrospective application. If K.S.A. 2006 Supp. 44-523(f) were applied to this matter, it would have the effect of dismissing the claim. Thus, if K.S.A. 2006 Supp. 44-523(f) were applied here, claimant’s vested right to pursue her claim would be abrogated.

Within *Powe* and *Peters* are dissents, which are not to be ignored. A pertinent part of the dissent of *Peters* states:

These Board Members agree with the ALJ’s analysis. The Legislature has the power to change the conditions by which an injured worker must maintain an action against an employer for workers compensation benefits. Furthermore, statutes of limitations have been held to be remedial and can be applied retrospectively. Accordingly, the statute need not be applied evenly and equally to all claims. All claims are not entitled to the same five-year period before they are subject to dismissal. Because the statute is remedial, it can operate retrospectively, to affect accidents that occurred before its effective date. Instead of procedural versus substantive, the test is what constitutes a reasonable time after the enactment of K.S.A. 2006 Supp. 44-523(f) for the claimant to pursue her rights and either proceed to final hearing or obtain an extension from the ALJ. The statute should be applied to accidents that occurred before the effective date of the statute

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<sup>7</sup> *Id.* at 657-58, quoting *Davis v. Hughes*, 229 Kan. 91, 101, 622 P.2d 641 (1981), and *Nitchals v. Williams*, 225 Kan. 285, Syl. ¶ 1-3, 590 P.2d 582 (1991); see also *Ripley v. Tolbert*, 260 Kan. 491, 921 P.2d 1210 (1996); *Lakeview Village v. Board of Johnson County Comm’rs*, 232 Kan. 711, 659 P.2d 187 (1983).

<sup>8</sup> *Lyon v. Wilson*, 201 Kan. 768, 774, 443 P.2d 314 (1968).

only where there has been a reasonable opportunity after the effective date of the statute to protect claimants' rights.<sup>9</sup>

The dissent in *Peters* essentially argues that the test to be applied is one of reasonableness, and the five-year statute of limitations should retrospectively apply where a claimant has a reasonable time after K.S.A. 2006 Supp. 44-523(f) was enacted to take the claim to regular hearing, but fails to do so. However, the logic and reasoning of the dissent in *Peters* does not fall on deaf ears. The retrospective application of K.S.A. 2006 Supp. 44-523(f) to the current claim would not be reasonable.

Since *Powe* and *Peters*, the Board has also addressed this issue in *Salama*<sup>10</sup> and *Randel*.<sup>11</sup> This Board has consistently determined that K.S.A. 2006 Supp. 44-523(f) will not be retrospectively applied. Reversing this line of cases would be inconsistent and unreasonable, and would have the effect of impairing the vested rights of those claimants who have relied on past Board decisions on this issue. Therefore the Board finds K.S.A. 2006 Supp. 44-523(f) will not be retrospectively applied to the current claim.

It should be noted there are several factors that caused this claim to be heard more than five years after claimant filed an Application for Hearing. Simply put, an Application for Hearing is a request by claimant that the matter be set for a hearing. The original accident caused claimant to seek treatment for her left knee, right knee and lumbar spine. In addition, claimant has undergone extensive and lengthy psychological treatment in the form of psychotherapy and takes depression medication. At the time of regular hearing, respondent argued claimant had not reached MMI. The ALJ and the parties have equal responsibility to insure a claim proceeds in a timely fashion.

**Does the Board have jurisdiction of the issues concerning claimant's ongoing medical treatment?**

Claimant argues that this issue is not properly before the Board because, "[i]n fact, at no time prior to the entry of the Award did respondent raise the issue that claimant's rights to psychological treatment should be terminated."<sup>12</sup> This statement is not entirely correct as respondent did raise this issue in its submission letter to the ALJ. The submission letters of claimant and respondent were filed after the deadlines set by the ALJ. An Agreed Order was filed by the parties on July 30, 2010, extending the date for filing of

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<sup>9</sup> *Peters*, *supra*, at 8.

<sup>10</sup> *Salama v. Hen House Market*, No. 1,009,525, 2008 WL 2673163 (Kan. WCAB June 30, 2008).

<sup>11</sup> *Randel v. Leroy Perry d/b/a Perry Const.*, No. 251,165, 2008 WL 3280288 (Kan. WCAB July 31, 2008).

<sup>12</sup> Claimant's Brief at 2-3.

submission letters to August 30, 2010, for claimant and September 30, 2010, for respondent. Claimant filed her submission letter on October 6, 2010, and respondent filed its submission letter on October 7, 2010.

At regular hearing, there was an extensive discussion of the status of the case and the issues to be addressed. It appears the three issues to be decided were: (1) whether claimant had reached MMI; (2) whether K.S.A. 2006 Supp 44-523(f) should retrospectively apply; and (3) nature and extent of claimant's disability<sup>13</sup>.

At respondent's request, claimant underwent a psychological evaluation on July 10, 2010, by Dr. Theodore A. Moeller, a clinical psychologist. Dr. Moeller was deposed by respondent's counsel on September 16, 2010, to prove that claimant's need for psychotherapy is unrelated to her accident. Claimant's attorney extensively cross-examined Dr. Moeller concerning the psychological tests he conducted and his opinion concerning claimant's psychological problems. At Dr. Moeller's deposition, claimant's counsel did not object to Dr. Moeller's report being admitted into evidence. In its submission letter to the ALJ filed on October 7, 2010, respondent raised the issue of ongoing psychotherapy. The ALJ issued the Award on January 28, 2011. Claimant never filed a reply to respondent's submission letter or objected to the ALJ that termination of claimant's psychotherapy was not raised at regular hearing.

### **Is claimant entitled to ongoing psychological treatment?**

Dr. Moeller put claimant through a battery of psychological tests, and also interviewed her at length. He indicated this process generally takes up to seven hours. Dr. Moeller concluded that most of claimant's depression is caused by psychosocial issues and considerable stressors from her home situation, and are factors outside the current parameters for treatment of psychological factors secondary to work-related physical injuries. He also indicated that her psychological problems also stem from frustration with how she was treated by respondent and are not related to her injury<sup>14</sup>. Dr. Moeller recommended two or three more sessions for claimant with Dr. Dumont K. Schmidt for the work-related issues.<sup>15</sup> With regard to whether claimant should continue taking depression medication, Dr. Moeller indicated Dr. Ram is in position to make that determination<sup>16</sup>. Claimant presented no evidence on the issue of ongoing psychotherapy.

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<sup>13</sup> R.H. Trans. at 3-10.

<sup>14</sup> Id. at 64-65.

<sup>15</sup> Id., Ex 2.

<sup>16</sup> Id. at 75-76.



Apparently, because claimant did not object to respondent raising the issue of ongoing psychotherapy, the ALJ addressed this issue and determined claimant should continue receiving the therapy. The ALJ disagreed with Dr. Moeller and found claimant continues to benefit from psychotherapy along with pain management by Dr. Sollo. The ALJ also determined “[t]here is no evidence that she should be removed from psychotropic medication prescribed by Dr. Ram.”<sup>17</sup>

Dr. Moeller does not dispute claimant has psychosocial issues and frustration stemming from a perception that her former employer did not support her. In his report, he states: “[s]he has recovered well from her injury and, but for the two or three additional sessions recommended, Ms. Welty currently at MMI. She does not appear to have any permanent psychological impairment from the work related injury.”<sup>18</sup> Dr. Moeller does note claimant should continue with therapy for her other unresolved issues.

Claimant admitted upon cross-examination that she is seeing Dr. Schmidt for issues other than her work-related accident:

- Q. (Mr. Burnett) You notice I read some of the events at Doctor Schmidt’s office, and you talk about your new job, you talk about the loss of your new job you talk about your kids, you talk about your family, but I didn’t see much about the actual injury that you are actually treating with Doctor Schmidt with currently. Are you?
- A. (Claimant) Yes. It’s kind of all of that mixed together. It’s pretty hard to just separate out one issue when they all kind of relate to each other. My role in my family has changed tremendously since this injury occurred.<sup>19</sup>

The testimony of Dr. Moeller is credible and persuasive. Responding to extensive and incisive cross-examination by claimant’s counsel, Dr. Moeller explained in detail the test results and his conclusions concerning claimant’s psychological state. He also explained that a person who independently evaluates a person for psychological issues secondary to an accident is in a better position to assess the situation and what is needed than the treating psychologist, and then explained why this is true. Dr. Moeller also noted Dr. Schmidt had not done extensive psychological testing on claimant. The Board finds the recommendations of Dr. Moeller should be adopted.

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<sup>17</sup> Award at 6.

<sup>18</sup> Moeller Depo., Ex. 2.

<sup>19</sup> R.H. Trans. at 27-28.

**CONCLUSIONS**

1. K.S.A. 2006 Supp. 44-523(f) will not be retrospectively applied.
2. Claimant failed to object to the ALJ that claimant's ongoing psychological treatment is not a proper issue.
3. The Board will follow the recommendations of Dr. Moeller with regard to claimant's ongoing psychological treatment.
4. In its appeal, respondent did not address the issue of whether claimant has reached MMI nor did the ALJ address this issue in the Award and, therefore, the Board must presume claimant is at MMI.
5. Respondent did not appeal the issue of nature and extent of claimant's disability. None of the parties address this issue in the briefs. Therefore, the Board affirms the ALJ on the issue of nature and extent.
6. Future medical will be considered upon application.

**AWARD**

**WHEREFORE**, the Board reverses the January 28, 2011, Award entered by ALJ Nelsonna Potts Barnes with regard to ongoing psychological treatment for claimant, but affirms the remainder of the Award. Future medical treatment will be considered upon application.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June, 2011.

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BOARD MEMBER

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BOARD MEMBER

**DISSENT**

The undersigned Board members respectfully dissent from the opinion of the majority. We do so for the reasons set out in our Dissents in *Randel* and *Peters*, and our Concurring in Part and Dissenting in Part Opinion in *Salama*, and our Concurring Opinion in *Powe*. Unfortunately, this claim is time-barred by K.S.A. 2006 Supp. 44-523(f).

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BOARD MEMBER

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BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant  
Dallas L. Rakestraw/Vincent A. Burnett, Attorney for Respondent  
Nelsonna Potts Barnes, Administrative Law Judge